**LIP SENG ENGINEERING WORKS**

**v.**

**KWONG YIK FINANCE BHD.**

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. C4209 OF 1985]
29 JUNE 1988

***CONTRACT:*** *Letter of Undertaking - Defendant agreeing to pay plaintiff for machinery supplied to 3rd party - 3rd party allegedly paid the plaintiff - Defendant argued that as 3rd party had paid the plaintiff they are not liable - Laches in commencing action - Order 14 Rules of the High Court 1980.*

By a letter of undertaking dated 17 March 1983, in consideration of the plaintiffs supplying certain equipments to a company called Moristiles Sdn. Bhd. ("the lessees") to whom the defendants had granted lease financing facilities, the defendants agreed to pay the price of the equipment to the plaintiffs. The dispute arose in respect of the balance sum of RM385,000 for which the defendants refused to pay on the ground that the lessees had already made such payments direct to the plaintiffs as evidenced in 3 receipts Nos. 069, 078 and 077. In reliance upon these 3 receipts the defendants had duly reimbursed the lessees and maintained that they were not liable under the letter of undertaking to pay the balance sum to the plaintiff.

The Senior Assistant Registrar allowed the plaintiffs leave to sign final judgment under O. 14 RHC 1980 and the defendants appealed against the decision.

**Held:**

**[1]** As for receipt No. 069 it was clear from the date thereon that it was not made in settlement of the balance sum due from the defendant to the plaintiff.

**[2]** In respect of the remaining 2 receipts the plaintiff had clearly explained that they never received any money from the lessees in settlement of the balance sum but were issued in order to enable the lessees to claim the money from the defendant on the plaintiffs' behalf. This was not disputed by the defendant.

**[3]** In the absence of any other evidence to the contrary, and in the basis of the letter of undertaking it was concluded that the defendants had defaulted in paying the balance sum to the plaintiff and accordingly the defendants were liable to pay to the plaintiff the balance sum.

**[4]** Laches had no application in this case and as the claim had not been statute barred, the defendants could not rely on a delay of 2 years from the time of the right of action arose to the date of filing of this suit to state that the plaintiffs had no cause of action against them.

*[Accordingly the appeal was dismissed with costs.]*

*For the defendants/appellants - Kumar; M/s. Shook Lin & Bok*
*For the plaintiffs/respondents - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.*

**JUDGMENT**

**Siti Norma Yaakob J:**

The claim in this suit is in respect of a balance sum allegedly due and owing from the defendants pursuant to a letter of undertaking dated 17 March 1983 Under the undertaking and in consideration of the plaintiffs supplying certain equipments to a company called Moristiles Sdn. Bhd. (the lessees), to whom the defendants had granted lease financing facilities, the defendants agreed to pay the price of the equipments to the plaintiffs upon the terms and conditions contained therein.

Between 25 March 1983 to 17 June 1983, the plaintiffs issued 4 invoices in respect of the equipments delivered to the lessees and the total sum payable was RM115,000 for which the defendants settled in full by tendering 4 cheques to the plaintiffs directly.

However the instant dispute in over the non-payment of 3 other invoices, numbers 370, 380 and 381 totalling a sum of RM385,000 and for which the defendants refused to pay on the ground that the lessees had already made such payments directly to the plaintiffs as evidenced by the plaintiffs' following receipts,

(1) number 069 dated 1 February 1983 in payment of invoice 370.

(2) number 078 dated 24 May 1983 in payment of invoice 380, and

(3) number 077 dated 5 July 1983 in payment of invoice 381

Relying on these 3 receipts, the defendants had duly reimbursed the lessees for such payments and they now maintain they are not liable under the undertaking to make payment of the RM385,000 which is being claimed by the plaintiffs.

From the submissions, it is clear that the only issue, if any, is the determination of the mode of payment stipulated in the undertaking.

From the second paragraph of the undertaking, it is very clear that the defendants undertook to pay the plaintiff the sum of RM500,000 being the full payment of the purchase and installation price of the equipments subject to 6 conditions, the most relevant being condition 2 which reads as follows.

> KFY must receive in writing from lessee (a) the lessee's acceptance and acknowledgement of delivery of said equipment in satisfactory conditions and approval of your invoice for same, and (b) the lessee's instruction to KYF to pay your invoice for said equipment.

From these, it clearly follows that once the plaintiffs had delivered the equipments to the lessees accompanied by their invoices, and the lessees had accepted and acknowledged delivery of the equipments to be in satisfactory condition and had instructed the defendants to settle the invoice, it is incumbent upon the defendants to make payment directly to the plaintiffs. This arrangement stands to reason for after all the person to benefit from the use of the equipments is only a lessee who is therefore not excepted to make settlement on any invoice issued by the plaintiffs. That part of it has already been undertaken by the defendants themselves.

As for the plaintiffs' receipt number 069 which acknowledges receipt of a payment of RM95,000 from the lessees, the date of the receipt itself is clear proof that such payment was not made in settlement of invoice 370 as the receipt is dated earlier than the invoice. Invoice 370 dated 22 March 1983 whilst the receipt is dated 1 February 1983. Moreover the cheque made in payment and mentioned in the receipt tallies with the advance paid by the lessees pursuant

to the plaintiffs' quotations of fabricating and installing the equipments contained in their letter dated 28 January 1983, long before the letter of undertaking was executed on 17 March 1983 and such payment was made when the lessees had not yet obtained any lease financing from any institution. However, the cheque was never banked as it lacked the signatory of another director of the lessees.

As for the other 2 receipts, the plaintiffs have explained that they are not what they purport to be. They never received any money from the lessees in settlement of invoices 380 and 381 but nonetheless the 2 receipts were issued as blank copies to facilitate the lessees claiming the amounts due under the 2 invoices directly from the defendants on the plaintiffs' behalf.

The fact that this form of payment had been resorted to was in no way disputed by the defendants as they had confirmed that payment of the plaintiffs' invoices had been made through the lessees to the plaintiffs. But does this entitle the defendants to reimburse the lessees when there is no proof that the lessees had in fact paid the plaintiffs for the 2 invoices?

As lessees of the equipments, it is highly unlikely that they were in a position financially to make payments and since it is the defendants who had alleged that the lessees did so, an affidavit from the lessees was all that was needed to throw some light as to what actually happened. Since there is none, I am left with the undertaking as to the mode of payment that had been agreed between the parties. As by their own agreement, such payment must be made by the defendants directly to the plaintiffs subject to the condition certifying that the equipments delivered were in good order for which payment can be made, I had accordingly concluded that the defendants had defaulted in paying 3 of the plaintiffs' invoices totalling a sum of RM385,000.

The defendants have also pleaded that the plaintiffs had taken their time to enforce their right to claim for the balance sum due under the undertaking. The plaintiffs filed their claim in July 1985 The first of the 3 invoices, invoice 370 is dated 22 March 1983 and the plaintiffs' right of action accrues after that date and since their claim is in the nature of a debt, the statutory period of 6 years applies as to bar them from enforcing their right to sue. Laches has no application here and since the debt has not yet become statute barred, the defendants cannot rely on the delay of 2 years from the time and the right of action arose to the time of the filing of the suit, to state that the plaintiffs have no cause of action against them.

For the above reasons, I had confirmed the order of the Senior Assistant Registrar, allowing the plaintiffs leave to sign summary judgment against the defendants and accordingly dismissed the defendants' appeal with costs.

Also found at [1988] 2 CLJ 457